No. 17-626

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY SUPPORTING JURISDICTIONAL STATEMENT

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The plaintiffs' attempt to recycle failed jurisdictional arguments that were raised and rejected in the stay papers confirms this Court's jurisdiction. And their effort to defend the district court's decision to issue an advisory opinion about a moot challenge to a map never employed in a single election only confirms that the district court addressed the wrong question about the wrong map. This Court should deny the plaintiffs' motions and note probable jurisdiction or summarily reverse.

I. This Court Has Jurisdiction to Review the District Court's Order.

The plaintiffs do not seriously dispute that the district court's order invalidating Plan H358 had the practical effect of precluding its use in the 2018 elections. Nor could they, as the district court held that multiple State House districts violate the Constitution or the Voting Rights Act, and that those violations "must be remedied." J.S. App. 85a. Moreover, it made clear that if the Legislature did not immediately redraw these districts, the court would—and would do so in time for the 2018 elections. After all, the court would not have needed to put the Governor on a three-business-day deadline and otherwise rush to redraw the map if it had not already determined that the existing map could not be used in 2018.

The plaintiffs claim that none of this matters because *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970), "has already squarely rejected" the State's jurisdictional argument. MALC Mot. 19. But that argument has no more force now than when it was raised and rejected during the stay proceedings.

The starkly different facts and the reasoning in *Gunn* underscore that this Court has jurisdiction here. *Gunn* reasoned that "[o]ne of the basic reasons for the limit in 28 U.S.C. § 1253 upon [the Court's] power of review is that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided—a state of affairs that [was] conspicuously evident" in that case because the order appealed from was unclear as to what "was to be enjoined," "against whom" the injunction would run, and whether "all the provisions of the statute" were to be enjoined. *Gunn*, 399 U.S. at 388. Here, by contrast, the district court's order clearly blocks the State of Texas from using Plan H358 in 2018. The plaintiffs do not suggest otherwise.

The plaintiffs argue that the district court's order is a mere liability determination, not an injunction, because "there are many potential ways to remedy a particular violation." MALC Mot. 21. But this confuses whether the court's order is the final order in this case with the distinct question whether it enjoins the existing map. An injunction does not have to definitively resolve the case (otherwise, no preliminary injunction would be appealable); it just has to prevent the appealing party from doing something.[1] Because the district court's order prevents the State from conducting future elections using H358, it is appealable and not merely a resolution of liability. *Cf.*

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[1] The district court's order here did much more than simply order the State "to come to court prepared to discuss remedies." MALC Mot. 21 n.9.

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742 (1976). This suffices to provide the Court with jurisdiction under §1253 even though the district court has not yet completed the remedial phase of the case.

The plaintiffs' reliance on *White v. Regester*, 412 U.S. 755 (1973), is also misplaced (as it was at the stay stage), as that case actually supports the State. *White* held that jurisdiction existed to review a district court order declaring Texas's House redistricting map unlawful, ordering the State to reapportion two counties into single districts, and stating that the court would reapportion the districts if the State did not. *Id.* at 760-61. That is exactly what the district court's order on Plan H358 does. The only distinction is that the district court in *White* expressly labeled its order an injunction. But as *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), makes clear, it is the practical effect—not the label—of the order that matters. *Id.* at 83. Because the district court's order has the same practical effect as the order in *White* and numerous other cases over which this Court has exercised jurisdiction, *see, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Gill v. Whitford*, No. 16-1161 (U.S.), it is equally appealable. The plaintiffs' contrary argument would artificially restrict *Carson* and allow district courts to evade this Court's jurisdiction by omitting magic words from their orders.

II. The 2013 Legislature Did Not Engage in Intentional Discrimination When It Enacted Court-Ordered Districts as Its Own.

The district court held that in 2013, the Texas Legislature engaged in intentional racial discrimination when

it adopted districts ordered by the district court itself under this Court's instruction to enter a remedial plan that had no discriminatory purpose or effect. *See Perry v. Perez*, 565 U.S. 388 (2012) (per curiam). That holding is both extraordinary and misleading. *See* J.S. 14-15.

1. The plaintiffs cannot deny that the district court's conclusion that *the 2013* Legislature engaged in intentional discrimination by embracing the court's own remedial plan was driven entirely by the court's (erroneous) view that *the 2011* Legislature engaged in intentional discrimination when it enacted *the 2011 plan*. That is wrong, as the relevant question for purposes of challenges to *Plan H358* is why *the 2013* Legislature enacted that plan. The motives of the 2011 Legislature in enacting a different plan simply did not matter. Unlike discriminatory *effect*, discriminatory *intent* does not carry over from one legislative enactment to another—and different—one. Accordingly, whether the plaintiffs had viable challeges to *the 2011 plan* was a question the district court never should have been asking in the first place.

The plaintiffs wisely concede that the district court lacked Article III jurisdiction over those challenges[2] because "any challenge to the continued use of Plan H283 would be moot." MALC Mot. 1.[3] Yet they nonetheless

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[2] The plaintiffs helpfully note that their claims ultimately challenge statutes passed by the Legislature, not lines on a map. *See* MALC Mot. 1-2. Once the 2011 statute was repealed, the plaintiffs could bring live claims only against the 2013 statute that replaced it.

[3] The plaintiffs' desire for preclearance bail-in under VRA §3(c) could not keep those claims alive. Bail-in is not a "claim

maintain that the court's issuance of an advisory opinion on the 2011 plan "matters not at all" because the court "just as easily could have put" its findings on the 2011 plan into its opinion on Plan H358 instead of issuing a separate decision on the validity of the 2011 plan. *Id.* at 27. That misses the point. The advisory opinion on the 2011 plan is problematic not just because of the form in which it was issued, but because it asked the wrong question about the wrong legislature. The district court had no business adjudicating moot challenges to a repealed map or evading a clear focus on whether the 2013 Legislature adopted the district court's own map for discriminatory reasons.

The district court thought otherwise only because it was under the profoundly mistaken impression that the purported discriminatory *intent* of a past legislature must be "cured" by a future one. In reality, what matters is why the 2013 Legislature enacted the district court's remedial plan as its own. And the answer is clear: because that was its best chance to put an end to protracted litigation by enacting a districting plan that would pass constitutional and VRA muster.

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against Plan H283," MALC Mot. 27 n.10; it is a prospective remedy that requires a judgment on live claims. And preclearance alone cannot provide Article III standing because it does not cure an ongoing concrete injury-in-fact currently suffered by the plaintiffs from Plan H283. *See, e.g., Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) (holding that a plaintiff's interest in a benefit—there, a *qui tam* relator's bounty—"that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes").

2. The plaintiffs attempt to resist that conclusion by emphasizing that the district court's 2012 remedial decision was not a final adjudication of challenges to the districts that the Legislature embraced. No one said it was. Indeed, the preliminary posture of that decision is part and parcel of why the district court applied a standard uniquely favorable *to the plaintiffs*.[4] But once the district court drew a map that remedied every district with a colorable defect based on a pro-plaintiff standard, that gave the Legislature every reason to believe that the map did not violate the Constitution or the VRA. It would have been strange indeed for the Legislature to ignore a directly on-point opinion from a federal court simply because it reflected preliminary, not final, findings and conclusions.

The plaintiffs nonetheless suggest that the Legislature should have held off because those conclusions "could change after a full trial on the merits." MALC Mot. 28. But there was no guarantee that there would ever be a trial on the 2011 plan, as the court could not hold one unless and until the plan was precleared. *See, e.g.*, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam). And indeed, the 2011 plan never was precleared, so (but for the district court's insistence on adjudicating

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[4] Claims of retrogression and intentional discrimination under VRA §5 were judged under "the low 'not insubstantial' standard," J.S. App. 313a, outlined by this Court in *Perry v. Perez*. J.S. App. 302a. The remaining claims were considered under the standard for preliminary injunctions, which requires only a showing that the plaintiff is *likely* to succeed, not that it will actually do so. *Id.*

moot claims) the challenges to that map never should have been finally adjudicated.

3. The plaintiffs fare no better with their effort to insulate the district court's ruling from review by recasting it as a finding of fact. MALC Mot. 24-25, 29. The clear-error standard does not apply to fact findings that rest on legal errors. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). And the district court's conclusion about the 2013 Legislature's purpose is built on several legal errors—beginning with its failure to dismiss moot claims against the 2011 plan, on the theory that the 2013 Legislature could be held responsible for the purported wrongs of the 2011 Legislature, and ending with its application of a novel intentional-discrimination standard that conflicts with this Court's holding in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). *See* J.S. 24-25.

In reality, the district court's assessment of the districts it ordered in 2012 gave the Legislature the best possible basis to believe that adopting the district court's plan as its own would achieve compliance with the Constitution and the VRA. The district court's opinion in 2012 was crystal clear: "this Court's interim plan . . . does not incorporate any portion of the State map that is allegedly tainted by discriminatory purpose." J.S. App. 305a. The Legislature did not engage in intentional discrimination by taking the district court at its word.

Indeed, neither the plaintiffs nor the district court has identified any evidence that the 2013 Legislature

adopted Plan H358, or failed to alter any district, "because of," not "in spite of," its effect on minority voters. *Feeney*, 442 U.S. at 279.[5] To the contrary, the district court all but admitted that it had no basis to find actual discriminatory purpose by the 2013 Legislature when it expressly found "that the intentional discrimination in 2013 was limited to the Legislature's intent to maintain and perpetuate (without remedy) any infirmities in the plan that already existed." J.S. App. 7a. The undisputed fact that the 2013 Legislature relied on the district court's own remedial order, not to mention the presumptions of good faith and constitutionality, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), should have foreclosed any finding of discriminatory purpose here.

III. Plan H358 Does Not Cause Any Vote Dilution.

Even setting aside the district court's fatally flawed intent holding, the plaintiffs' vote-dilution claims still should have been rejected for failure to prove discriminatory effect. The plaintiffs try to get around that problem by arguing that vote-dilution claims do not require proof of vote-dilutive effect. That self-contradictory argument conflicts with this Court's precedent and the text of VRA §2.

This Court has made clear that a claim of intentional vote dilution under the Fourteenth Amendment requires proof of both intent to dilute minority voting strength *and* actual vote-dilutive effect. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (electoral systems "violate the

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[5] The plaintiffs do not even attempt to defend the district court's one-person, one-vote rulings. *Cf.* J.S. 25-27.

Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"). Discriminatory intent alone cannot establish a constitutional violation. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

Accordingly, the plaintiffs must prove that they satisfy all three of the preconditions established by *Thornburg v. Gingles*, 478 U.S. 30 (1986), to prove that minority voters actually "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b). If those preconditions are not established, there is no basis to conclude that a plaintiff has been denied equal access to the political process and therefore no vote-dilutive effect.[6]

Even if the plaintiffs' newfound theory were sound, it is not the theory they advanced below. From the beginning, they have maintained that the Legislature intentionally diluted minority voting strength because "'despite massive minority population growth statewide,' [it] created no increase in the number of minority opportunity districts." MALC Mot. 3-4. And the failure to draw more legislative districts is the only harm they point to here. *See id.* at 32 (complaining that Dallas County districts "deny Latinos their fair share of seats within the

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[6] The plaintiffs' attempt to limit their no-*Gingles*-required theory to cases involving intentional discrimination imposes no limit at all. *See* MALC Mot. 31. The plaintiffs—and the district court—erroneously rely on the State's failure to draw districts *not* required by *Gingles* as evidence of intentional discrimination.

county"). Yet, except in Nueces County, it is not even possible to draw additional majority-Hispanic districts. That should end the inquiry.

Even if two majority-Hispanic districts could have been drawn in Nueces County, there is no evidence of vote-dilutive effect there either, as the evidence showed the electoral performance in those two districts would have been "so low as to indicate a lack of real electoral opportunity in both districts." J.S. App. 44a. That evidence was introduced *by MALC* to prove that two bare majority-minority districts would *not* have been minority-*opportunity* districts under *Gingles*. *Id.* Moreover, that it may now be possible to draw two bare-HCVAP-majority districts in Nueces County does not prove that the Legislature diluted Hispanic voting strength by failing to draw such districts, particularly when doing so arguably would have overrepresented Hispanic voters. *Id.* at 51a. And alleged *statewide* underrepresentation is completely irrelevant to the question of vote dilution *in Nueces County*, MALC Mot. 34, particularly when the district court correctly found that "Hispanics are being elected to countywide offices and as house district representatives, indicating a lack of barriers to candidacy and election." J.S. App. 55a.

IV. The Legislature Did Not Engage in Unconstitutional Racial Gerrymandering in HD90.

The Texas Latino Redistricting Task Force's motion shows how the district court's analysis as to HD90 put the Legislature in a double bind. The Task Force does not even attempt to defend the district court's illogical determination that HD90 was "tainted" by intentional

discrimination supposedly left over from 2011. J.S. App. 83a, 85a. Nor could it, as the Legislature redrew the district in 2013, and the district court itself correctly concluded that the redrawn district evinced a "lack of a discriminatory intent." *Id.* at 84a. Indeed, the Task Force effectively concedes the district court's error when it claims that the 2013 Legislature should have "refrain[ed] from redrawing HD90 in 2013." Task Force Mot. 25. But that claim succeeds only in confirming that, in the plaintiffs' view, the 2013 Legislature was bound to violate either the VRA or the Fourteenth Amendment no matter what it did in HD90.

The facts in HD90 are not disputed. The district was reconfigured to honor an African-American neighborhood's request to be brought back into the district, while also maintaining the district's Hispanic-voter-registration majority.[7] J.S. App. 72a-74a, 77a, 83a. The Legislature kept the percentage of Hispanic voters as close as possible to the preexisting level in direct response to MALC's claim that reducing the percentage of Hispanic voters would violate VRA §2. Yet the Task Force still brought VRA §2 vote-dilutive-effect claims against the State. *Id.* at 69a-70a, 83a-84a. If taking race into account to avoid a VRA §2 claim actually threatened by one mi-

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[7] Texas does not concede that the motives or acts of a single staff member or legislator can be attributed to the entire Legislature. But if they are, the Legislature must also get the benefit of their favorable knowledge and statements. *Cf.* Task Force Mot. 22 (arguing that Texas cannot rely on conversations between staff members).

nority group just lays the groundwork for a racial gerrymandering claim by another, then there really is no "breathing room" for the Legislature to draw districts that comply with both the VRA and the Constitution. *Cooper*, 137 S. Ct. at 1464.

CONCLUSION

The Court should deny the plaintiffs' motions and note probable jurisdiction, or summarily reverse the district court's order invalidating Plan H358.

Respectfully submitted.

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